

REMARKS

Claims 1, 4-5, 10, 12-16, 18, 24, 25, 29, 33, 34, 41-44 were pending in this application and were rejected in the Office Action dated November 28, 2008. Claims 1, 33 and 34 have been amended hereby and claim 41 has been cancelled.

The Examiner rejected claims 1, 4-5, 10, 12-16, 18, 24-25, 29, 33-34 under 35 U.S.C. § 101 on the basis that the claimed invention is directed to non-statutory subject matter. While applicants disagree with this rejection, in an effort to expedite prosecution, claim 1 has been amended to recite the step of “analyzing a sample obtained from the human for the presence of one or more genetic variations in α -actinin-3 (ACTN3) gene.” It is believed that the claims recite statutory subject matter.

The Examiner rejected claims 41-44 under 35 U.S.C. § 112, first paragraph, for lack of enablement. Claim 41 has been cancelled by this amendment. Moreover, applicants note that claims 42-44 are dependent from claim 1 and not from claim 41. Applicants believe that claims 42-44 are enabled by the specification.

The Examiner rejected claims 1, 4-5, 10, 12-16, 18, 24-25, 29, 33-34, and 41-44 under 35 U.S.C. § 112, second paragraph, on the basis of being indefinite. The Examiner stated that the claims are indefinite because they lack a positive active step relating back to the preamble. Applicants first note that claim 41 has been cancelled, thereby obviating the rejection of claim 41. With regard to the remaining claims, applicants submit that claim 1, as currently amended, includes a positive active step relating back to the preamble. All remaining claims in this rejection are dependent from claim 1, and therefore, include a positive active step by reference to claim 1.

Applicants believe that in view of the foregoing amendments and remarks, all pending claims are currently in condition for allowance. Prompt review and favorable consideration of the same is requested.

Respectfully submitted,

SHERIDAN ROSS P.C.

By: /Gary J. Connell/
Gary J. Connell
Registration No. 32,020
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
(303) 863-9700

Date: February 11, 2009